STATE OF MICHIGAN
IN THE SUPREME COURT

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellant,

v

ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

Appellee.
_____/

Supreme Court No. 153118

Court of Appeals No. 321946

MPSC Case No. U-17077

REPLY BRIEF OF APPELLANT MICHIGAN PUBLIC SERVICE COMMISSION

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INTRODUCTION

Enbridge wants this Court to believe that the Court of Appeals' opinion is narrow. But Enbridge would burn a house down to solve an ant problem. Its desire to upend a settlement agreement creating an electric revenue decoupling mechanism could jeopardize many other commission-approved settlement agreements. Enbridge stands by the Court of Appeals' holding that no reasonable person could have believed that decoupling mechanisms were lawful even though no statute prohibited the mechanisms. Enbridge further stokes the fire by supporting the Court's holding that the strong public policy binding people to their settlements is not advanced when those settlements affect nonparties. According to Enbridge, these holdings will not affect settlement agreements because this was not what the Court intended. But intentional or not, the result is the same.

If the commission believed that the Court of Appeals' opinion was narrow and would not threaten commission-approved settlement agreements, the commission would not have appealed the decision. It has been seven years since the commission asked this Court for leave to appeal an opinion. The commission has responded to many applications, but it has not filed one of its own since 2009 when it appealed *Great Wolf Lodge v Public Service Comm*, 285 Mich App 26, 30; 775 NW2d 597 (2009), *rev'd* 489 Mich 27 (2011).

The Court of Appeals' decision will likely confound efforts to settle cases that impact the public or resolve disputes about the law. This Court should grant leave to appeal and reverse the decision, or alternatively, this Court should strike the analysis about commission settlements and third parties.

ARGUMENT

I. The Court of Appeals' opinion will lead to confusion in administrative proceedings about whether parties are bound by the settlement agreements they sign.

The Court of Appeals opinion will cause confusion about the binding nature of settlement agreements in administrative proceedings. The Court held, "[T]he strong public policy behind the long-standing doctrine that requires people to be bound by their settlements simply is not advanced when such a 'settlement' affects countless others that were not a party to the agreement." *Enbridge Energy*, ___ Mich App at ___; slip op at 5 (citations omitted). Yet, Enbridge does not believe that the opinion casts doubt on the binding nature of settlement agreements that affect third parties. (Enbridge's Answer to the MPSC's Application for Leave to Appeal, p 40.) Relying on authority that the commission cited in its application, Enbridge says there is no room for doubt that settlement agreements are binding, even if they affect third parties. (*Id*.) Unfortunately, the Court of Appeals did not agree.

The Court's opinion clouds what would otherwise be clear law by suggesting that settlement agreements are not binding if they affect nonparties. The Court did not distinguish this case from any of the cases that the commission cited in its application about agreements that bind third parties. Nor did the Court of Appeals point to a single Michigan case overturning an agreement because it affected nonparties. Despite this, the Court of Appeals' decision is a published case, and if this Court does not overturn it, it will have "precedential effect under the rule of stare decisis." MCR 7.215(C). The Court's decision is an open invitation to parties

and interested nonparties to challenge commission-approved settlement agreements that affect nonparties.

Enbridge argues that the Court of Appeals' holding is narrow. "The Court of Appeals simply provided two reasons that *Dodge* does not apply." (Enbridge's Answer, p 33.) This may have been what the Court intended, but the Court used sweeping language that could be applied universally to discredit *all* agreements (both inside and outside the regulatory context) that affect nonparties. In other words, if this holding is true here, it will be true in other instances as well. There is nothing to prevent a party who enters into an agreement, but is later seized with buyers' remorse, from refusing to abide by the agreement if it can show that the agreement affects nonparties. And there is nothing to prevent a nonparty who is interested in a case (e.g., a rate case that sets rates for nonparties) from waiting out the case to see if they like the outcome before deciding whether or not to appeal — just like Enbridge did in this case.

II. The Court of Appeals' opinion will discourage settlement agreements in all cases resolving disputed issues of law.

The Court of Appeals' opinion will discourage settlement agreements in all cases — not just cases in administrative proceedings — resolving disputed issues of law. Although no statute or court had expressly prohibited electric decoupling mechanisms, the Court of Appeals' held that the parties in this case should have known that these mechanisms were illegal and that "it was not reasonable to believe that the law was in dispute or otherwise unclear." *Enbridge Energy*, ___ Mich App at ___; slip op at 5. The commission explained, in its application, how this

holding is a barrier to settlement for parties striving to reach an agreement in the midst of legal uncertainty. (MPSC's Corrected Application, pp 28–30.) If the parties resolve a dispute about the law in a settlement agreement, and a court later interprets the law differently, the parties run the risk that the same court will disregard the agreement as unreasonable.

Enbridge, like the Court of Appeals, focuses on why it allegedly was not reasonable to believe that the law governing electric decoupling mechanisms was in dispute or otherwise unclear. (Enbridge's Answer, pp 17–21.) To support its position, Enbridge points to the Court of Appeals' decision that originally invalidated electric revenue decoupling mechanisms. (Enbridge's Answer, p 18, citing *In re Detroit Edison Co*, 296 Mich App 101; 817 NW2d 630 (2012).) The commission did not have the benefit of this decision when it approved the settlement agreement approving UPPCo's decoupling mechanism, but Enbridge still believes that electric revenue decoupling mechanisms were obviously unlawful.

Enbridge's actions, however, speak louder than words. History tells us that Enbridge did not always believe the argument it is making now. If Enbridge had always believed that electric decoupling mechanisms were unlawful, it would have put its words into action. It would have intervened when UPPCo first proposed to implement a decoupling mechanism to put a stop to it. Instead, it waited to see what the judiciary said on the subject. That is, it waited until the Court of Appeals issued its opinion in *In re Detroit Edison Co* before it challenged UPPCo's decoupling mechanism. Enbridge's actions confirm what the commission has said

all along: the law was not clear. (See MPSC's Corrected Application, pp 33–36.) If the law was as clear as Enbridge says, it would not have waited to get involved.

Enbridge attempts to justify its wait-and-see approach by arguing that rates can always change, so there was no need for Enbridge to intervene to oppose UPPCo's decoupling mechanism or surcharge. As an example, it says that "whenever a utility files a new application seeking a rate increase, no one in any real sense would argue that such an application is a collateral attack on a previous PSC order that approved the current rates." (Enbridge's Answer, p 39.) But rate cases change rates prospectively. Enbridge asked the commission to undo a surcharge that had already taken effect when it filed its complaint. There is no comparison.

A. Parties should be able to rely on settlement agreements that reasonably interpret ambiguous statutes.

If there is an honest dispute about a statute that can reasonably be interpreted more than one way, parties should be able to interpret the statute in a binding settlement agreement. This is the heart of the commission's second argument. Enbridge agrees *as long as* those settlements do not include terms that exceed the commission's statutory authority or violate its statutory mandate. (Enbridge's Answer, pp 36–37.)[1] This begs the question. If an agreement is valid only if it does not include terms that conflict with the law (the very law the parties are interpreting), parties will have to interpret ambiguous laws correctly every

[1] Enbridge repeats this argument throughout its answer and brief in varying forms. (See Enbridge's Answer, pp 2, 15, 17, 28, 38.)

time. Under this interpretation, *Dodge v Detroit Trust Co,* 300 Mich 575; 2 NW2d 509 (1942) would not protect parties settling a dispute about the law from later judicial decisions arriving at a different conclusion.

Parties should not be prevented from settling a case merely because a statute delegating authority can reasonably be interpreted more than one way. If the law is ambiguous (e.g., it is not clear whether the commission has statutory authority to approve a ratemaking mechanism), parties should not be penalized for legal or regulatory uncertainty. This is particularly true when it is a close question that has never been interpreted by any court and when parties must resort to the rules of statutory construction. Obviously, if there is a clear statutory mandate or a prohibition, parties may not enter into settlement agreements that flout those mandates or prohibitions. That is not the case here.

Act 295 could reasonably be interpreted more than one way. The Act did not expressly prohibit the commission from approving electric decoupling mechanisms. The Act required the commission to implement gas decoupling mechanisms and required a report concerning electric decoupling mechanism. The Act did not expressly supersede the commission's pre-existing authority to approve electric decoupling mechanisms. This is why the Court of Appeals had to resort to the rules of statutory construction to invalidate the mechanisms. *Enbridge Energy*, ___ Mich App at ___; slip op at 4 (citing *French v Mitchell*, 377 Mich 364, 384; 140 NW2d 426 (1966)). Since the mechanisms presented a close legal question that had not yet been decided by any court, the parties were entitled to decide the question in order to settle the case.

The commission did not overreach by approving this agreement. Enbridge argues that upholding the agreement would allow regulatory agencies to unlawfully expand the scope of their authority through settlement agreements. In support, it offers a farfetched example:

> Under the PSC's rationale, if the parties agreed to a settlement agreement which required industrial customer to pay, by way of example, 90% of the costs of residential customers, then even though MCL 460.11(1) requires that rates be set at the cost serving [sic] each particular class, the PSC would be duty-bound to approve the settlement agreement even though the Legislature had expressly stated that such a result was unlawful. [Enbridge's Answer, p 30.]

Far from illustrating commission overreach, this example actually illustrates why the commission cannot overreach. Under *Dodge*, there must be an *honest dispute* about a statute's interpretation, and MCL 460.11(1) provides a clear mandate that is *beyond dispute* and could not be circumvented.

B. This Court should consider what the parties knew when they entered into the settlement agreement.

Enbridge suggests that this Court should not consider what the commission knew when it first approved the settlement agreement that created UPPCo's decoupling mechanism and should instead consider what the commission knew when it allowed UPPCo to reconcile the mechanism. (See Enbridge's Answer, p 27.) The reconciliation proceeding was the vehicle used to implement the decoupling mechanism. It allowed UPPCo to reconcile actual revenue with the base-revenue levels established in the rate case and credit or charge ratepayers for over- or under-recoveries. Enbridge argues that, by the time UPPCo sought to reconcile the

mechanism, the commission knew that the Court of Appeals had invalidated electric decoupling mechanisms. (*Id.*)

The issue is what the commission knew when it approved the settlement agreement creating the mechanism, not what the commission knew when UPPCo reconciled the mechanism. Enbridge mischaracterizes the Court of Appeals' opinion by saying that it "held that the PSC erred in 2012 when it upheld and implemented [i.e., reconciled] the settlement agreement with an RDM from an earlier case and dismissed Enbridge's complaint in this case." (Enbridge's Answer, p 2.) This is *not* how the Court framed the issue. It looked at the mechanism at the time it was initially approved rather than at the time it was reconciled: "[T]he question before us is whether, in approving *the underlying settlement*, the PSC exceeded its statutory authority." *Enbridge Energy*, ___ Mich App ___; ___ NW2d ___ (2015) (Docket No. 321946), slip op at 4 (emphasis added).

Even if we consider what the commission knew when UPPCo reconciled its mechanism, it does not change the result. By that time, the commission indeed knew that electric decoupling mechanisms were unlawful. This is why the commission shifted its focus. Instead of declaring that the mechanism was lawful, the commission said that the mechanism survived only because it was created through an agreement that was approved when the law was still in doubt. *In re Complaint of Enbridge Energy, Ltd Partnership against Upper Peninsula Power Co*, order of the Public Service Commission, entered May 13, 2014 (Case No. U-17077), p 11. In short, the commission followed *Dodge*, which looks at the law as it existed when the agreement was reached to determine if there was an honest dispute about

the law at the time. In this case there was, and the parties settled the dispute through compromise; no court's subsequent decision should upset that compromise.

C. *Dodge* is not distinguishable.

It is no defense to say, as Enbridge does, that the reasoning in *Dodge* does not apply to Enbridge because Enbridge was not a party to the underlying case. (Enbridge's Answer, pp 22, 25.) Enbridge had every opportunity to intervene in the underlying rate and decoupling reconciliation proceedings, (See MPSC's Corrected Application, pp 5–7, 21), but it did not. This Court should not allow Enbridge to use this failure to its advantage, undermining the outcome of a case that it chose to ignore. This would not be consistent with principles of equity and fair dealing. Cf *Amoco Oil Co v Kraft*, 89 Mich App 270, 275; 280 NW2d 505 (1979) (holding that it was not fair for a lessee to decline to exercise its fixed-price-purchase option and its option of first refusal and then seek to reassert its fixed-price option in the last year of the lease.)

It is also no defense to say that *Dodge* was decided on res judicata grounds. (Enbridge's Answer, pp 22–24.) This is a red herring. *Dodge* was decided on alternative grounds. One was res judicata, but the other ground for the decision was the principle expressed in this reply brief: a settlement resolving a disputed issue of law is not voided by a later court decision resolving the dispute differently. The Court specifically said that this ground was an independent basis for its decision. *Dodge v Detroit Trust Co*, 300 Mich at 613 ("Independent of the question of res judicata, there is the defense of compromise and settlement, which, if sustainable, would defeat the instant bill whether there had been any prior

adjudication or not."). It is this independent ground on which the commission relies, not res judicata.

CONCLUSION AND RELIEF REQUESTED

The commission asks this Court to grant leave to appeal and reverse the Court of Appeals' December 22, 2015 decision. The commission further asks this Court to reaffirm the commission's May 13, 2014 order in Case No. U-17077, which correctly applied *Dodge* to preserve the settlement agreement in Case No. U-15988. If it is not reversed, the Court of Appeals' decision will lead to doubts about whether agreements in administrative proceedings are binding. The decision will also discourage parties everywhere from settling disputes about the law.

Alternatively, if this Court elects not to grant leave, it should strike the analysis from the Court of Appeals' published decision that settlement agreements are not binding if they affect nonparties. This analysis was not necessary for the case's disposition.

Respectfully submitted,

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